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NO. 913

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES, *Petitioner*

v.

CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS, LTD., AND STANDARD-VACUUM OIL CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

may be destroyed without liability because their destruction was an incident of battle, and cases where the owner of property destroyed must be compensated is somewhat less than clear"; (R. 53). To differentiate between the destruction of property in the instant case and the losses which have been held noncompensable in related circumstances is to draw a distinction unsupportable by reason.

The large scale "scorched earth" tactics which belligerent nations have employed even within their own territories [8] warn against exalting principles of private equity into rigid constitutional rights to compensation which will not take into account governmental ability to pay. Property destroyed to prevent its imminent capture by an enemy is indistinguishable from property destroyed in the course of combat. Thus, the oil terminals here involved might have been destroyed by the Japanese while pressing their attack on the area. If they had been captured intact by the Japanese, it would have been incumbent upon our armed forces to destroy them in Japanese hands as soon as possible. The Japanese might have destroyed them to prevent recapture by our forces, or they might have been leveled by our own bombardment in liberating the area.

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[8] Examples are Russia during the Napoleonic and German invasions, and the Netherlands upon the Japanese invasion of the East Indies.

Destruction in any of these circumstances clearly would not be compensable under the Fifth Amendment. The fact that such destruction occurs shortly before it might otherwise be captured or destroyed—at a time when such destruction is more thorough and detrimental to the enemy and safer for our own people—does not create a right to compensation for property which would in any event be lost to the owner.

Congress, in the Philippine Rehabilitation Act of 1946 (60 Stat. 128, 129), authorized the payment of compensation for the destruction of, or damage to, property in the Philippines during World War II resulting from, *inter alia*, "action taken by or at the request of the military, naval, or air forces of the United States to prevent such property from coming into the possession of the enemy." At the same time, Congress made clear its view that such compensation is a matter of grace, rather than of constitutional right, by limiting the amounts of such compensation as prescribed in the last proviso of Section 102(a)[9] and in proportion to the funds appropriated for all Philippine property claims. The historical background for the view that compensation in the circumstances of the present case "is a matter of bounty rather than of strict

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[9] "*Provided further*, That in case the aggregate amount of the claims which would be payable to any one claimant under the foregoing provisions exceeds $500, the aggregate amount of the claims approved in favor of such claimant shall be reduced by 25 per centum of the excess over $500."

legal right" (Presidential Veto Message, Cong. Globe, 42d Cong., 2d Sess., Part V, p. 4155) is recounted in the Court's opinion in the *Pacific Railroad* case, 120 U.S. at 235-239.

It is also significant that, under international law, losses, such as those involved in this case, resulting from legitimate military operations generally create no right to compensation. Borchard; *Diplomatic Protection of Citizens Abroad* (1915), pp. 256-258, 264-265; 2 Whiteman, *Damages in International Law* (1937), pp. 1429 *et seq.*

3. Decisions involving the destruction or confiscation of property and property values without compensation in order to safeguard other legitimate interests of the Nation and the community also present persuasive analogies. The right of the United States to destroy property in the reasonable exercise of judgment on the field of battle is certainly no less than the right to inflict losses upon private citizens in the exercise of these other governmental powers.

The destruction of a house to prevent the spread of fire has been held not to require the payment of compensation. *Bowditch* v. *Boston*, 101 U.S. 16. Under the police power "the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities." *Lawton* v. *Steele*, 152

U.S. 133, 136. The owner of valuable cedar trees has been required to destroy them to prevent the spread of cedar rust to apple trees. *Miller* v. *Schoene*, 276 U.S. 272.

Similarly, since "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking," the blocking of access to a private person's property through the construction of a tunnel is not compensable, notwithstanding the special injury to a particular person. *Transportation Company* v. *Chicago*, 99 U.S. 635, 642. Destruction of valuable contract rights as a consequence of lawful government action is not a taking. *Omnia Co.* v. *United States*, 261 U.S. 502; *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89; *United States* v. *Carver*, 278 U.S. 294; *Morrisdale Coal Co.* v. *United States*, 259 U.S. 188. Confiscation of the vehicles of innocent owners where reasonably necessary to aid in law enforcement is permitted. *General Motors Corp.* v. *United States*, 286 U.S. 49; *United States* v. *Commercial Credit Co.*, 286 U.S. 63; *Van Oster* v. *Kansas*, 272 U.S. 465; *United States* v. *One Ford Coupe*, 272 U.S. 321.

4. The rationale of the decision of the Court of Claims, "that the burden to be met should be distributed among the people as uniformly as possible" and "that the public generally should bear

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the writ	6
Conclusion	18

CITATIONS

Cases:

Aleutian Livestock ... Inc. v. *United States*, 96 F. Supp. 626, certiorari denied, 342 U. S. 875	11
Bowditch v. *Boston*, 101 U. S. 16	14
Bowles v. *Willingham*, 321 U. S. 503	16
Brown v. *United States*, 8 Cranch 110	11
Commers v. *United States*, 159 F. 2d 248, certiorari denied, 331 U. S. 807	17
Falbo v. *United States*, 320 U. S. 549	17
Gallagher's Steak House v. *Bowles*, 142 F. 2d 530, certiorari denied, 322 U. S. 764	16
General Motors Corp. v. *United States*, 286 U. S. 49	15
Grant v. *United States*, 1 C. Cls. 41	9
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146	10, 17
Hijo v. *United States*, 194 U. S. 315	11
Hirabayashi v. *United States*, 320 U. S. 81	17
Jecker v. *Montgomery*, 18 How. 110	11
Juragua Iron Co. v. *United States*, 212 U. S. 297	10
Korematsu v. *United States*, 323 U. S. 214	17
Lawton v. *Steele*, 152 U. S. 133	15
Lichter v. *United States*, 334 U. S. 742	16, 17
Marconi Wireless Co. v. *United States*, 320 U. S. 1	3
Miller v. *Schoene*, 276 U. S. 272	15
Miller v. *United States*, 11 Wall. 268	11
Mitchell v. *Harmony*, 13 How. 115	9
Morrisdale Coal Co. v. *United States*, 259 U. S. 188	15
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89	15
Northern Pacific Railway Co. v. *North Dakota*, 250 U. S. 135	17
Omnia Co. v. *United States*, 261 U. S. 502	15
Oro Fino Consolidated Mines, Inc. v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948	16
Presbyterian Church v. *United States*, 53 C. Cls. 339	9
Respublica v. *Sparhawk*, 1 Dall. 357	11

Page

St. Regis Paper Co. v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815 16
Schenck v. *United States*, 249 U. S. 47 17
Selective Draft Law Cases, 245 U. S. 366 17
Shreveport Engraving Co. v. *United States*, 143 F. 2d 222, certiorari denied, 323 U. S. 749 16
Stewart & Bros. v. *Bowles*, 322 U. S. 398 16
Transportation Company v. *Chicago*, 99 U. S. 635 15
United States v. *Alcea Band of Tillamooks*, 329 U. S. 40, 341 U. S. 48 3
United States v. *Bethlehem Steel Corp.*, 315 U. S. 289 17
United States v. *Carver*, 278 U. S. 294 15
United States v. *Chemical Foundation, Inc.*, 272 U. S. 1 11
United States v. *Commercial Credit Co.*, 286 U. S. 63 15
United States v. *Esnault-Pelterie*, 299 U. S. 201 3
United States v. *One Ford Coupe*, 272 U. S. 321 15
United States v. *Irwin*, 127 U. S. 125 10
United States v. *Pacific Railroad*, 120 U. S. 227 ..... 7-9, 10, 14
Van Oster v. *Kansas*, 272 U. S. 465 15
Venus, The, 8 Cranch 253 11
Walker v. *United States*, 34 C. Cls. 345 9
White v. *Mechanics Securities Corp.*, 269 U. S. 283 11
Wiggins v. *United States*, 3 C. Cls. 412 9
Woodson v. *Deutsche Gold und Silber Scheideanstalt Vormals Roessler*, 292 U. S. 449 11
Yakus v. *United States*, 321 U. S. 414 16

CONSTITUTION AND STATUTE:

Constitution of the United States
Fifth Amendment 6, 13
Philippine Rehabilitation Act of 1946, 60 Stat. 128, 129 13

MISCELLANEOUS:

Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 14
A Symposium on Labor Law in War Time (1944) 29 Ia. Law Rev. 145, *et seq.* 16
Presidential Veto Message, Cong. Globe, 42d Cong., 2d Sess., Part V, p. 4155 14
Rules of the United States Court of Claims:
Rule 38 (c) 2
2 Whiteman, *Damages in International Law* (1937) 14

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 610

THE UNITED STATES, *Petitioner*

v.

CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS, LTD., AND STANDARD-VACUUM OIL CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on November 6, 1951, by the United States Court of Claims.

OPINON BELOW

The opinion of the Court of Claims (R. 44) is reported at 100 F. Supp. 970.

JURISDICTION

The judgment of the Court of Claims was entered on November 6, 1951 (R. 61). On Janu-

ary 29, 1952, the Chief Justice extended the time within which a petition for a writ of certiorari might be filed to and including February 25, 1952 (R. 62). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the destruction during hostilities of private property of military value to prevent such property from falling into the hands of the advancing enemy is a taking for public use which requires the payment of just compensation under the Fifth Amendment.

STATEMENT

The respondent oil companies brought suit to recover just compensation for their terminal facilities in Manila which were destroyed by the United States Army in its evacuation of the area before advancing Japanese troops.[1] The Court of Claims held the Government liable and reserved determination of the exact amounts of recovery for further proceedings.[2]

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[1] Three suits were filed which were consolidated in the court below. Certain claims, in addition to those for destruction of their terminal facilities in Manila, were made and adjudicated in the court below. This petition, however, is directed solely to that portion of the judgment which relates to the oil terminal facilities at Manila.

[2] Under Rule 38(c) of the Rules of the United States Court of Claims, trials in the first instance may be limited to the issues of law and fact relating to the right of recovery, with

Four commercial oil companies maintained terminals in the Pandacan District of Manila which were of great military value for the supply and storage of petroleum products (R. 3). The terminal facilities included wharves, rail and pipe lines, pumps, storage tanks, warehouses, residences for superintendents, can factories, cans, railroad tank cars, bulk tank trucks, package trucks and loading facilities (R. 3).

The Philippines were subjected to air attacks immediately after the attack on Pearl Harbor (R. 35). On December 23, 1951, the Commanding General ordered the withdrawal of all troops on Luzon to Bataan Peninsula (R. 38). On December 25, Manila was declared an open city (R. 39). On December 26, the terminals were ordered to be prepared for demolition (R. 39-41). On December 27, representatives of the oil companies were advised that the equipment would have to be destroyed, that they would receive orders in due course pertaining to destruction, and that a demolition net-work was being laid (R. 39-40). The demolition charges and net-work were in place within two or three days (R. 39).

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determination of the amount of recovery reserved for further proceedings. In the analogous situation in patent cases, where the issues of infringement and damages are separately tried, the judgment on infringement has been reviewed on certiorari before trial of the issue of damages. *United States* v. *Esnault-Pelterie*, 299 U. S. 201; *Marconi Wireless Co.* v. *United States*, 320 U. S. 1, 47. See also *United States* v. *Alcea Band of Tillamooks*, 329 U. S. 40, 341 U. S. 48.

At about the same time, in order to perfect the authority of the Chief Engineer of the Army in the Philippines to destroy the facilities, the Deputy Chief of Staff signed letters addressed to the oil companies directing them "on telephonic or personal instructions issued to you by a designated representative of this Headquarters" "to so disable all vital parts of your plant and station as to deny their use to the enemy" (R. 46). The evidence did not establish whether or not these letters were actually delivered (R. 41). The Chief Engineer had previously prepared letters dated December 25, 1941, addressed to the oil companies, stating that the terminal facilities "are requisitioned by the U. S. Army" and "that any action deemed necessary for the destruction of this property will be handled by the U. S. Army" (R. 39). These letters were delivered to the representatives of two of the oil companies shortly after they were advised of the necessity for destruction, but the evidence did not establish whether the letters were delivered to the others (R. 40). The terminals were demolished by the Army acting upon orders of the Chief Engineer on December 31, 1941 (R. 41).[3] The Japanese were already entering Manila at that time (R. 48).

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[3] Acquisition of real property was centralized under the Department Quartermaster, and was authorized by no other echelons of command (R. 35). Demolition of property was a function of the Engineers under the comand of the Chief of Engineers (R. 35). Prior to Decemer 1, 1941, no authority

After the liberation of Manila in February 1945, representatives of the oil companies applied to the Chief Engineer for release of the site of the terminals which were then occupied by the Army, and all the land was restored during 1945 and 1946 (R. 41).[4]

The Court of Claims found that the Army requisitioned the terminal facilities on December 27, 1941, "in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy" (R. 42).[5] Although recognizing that "the only use the Army made of plaintiffs' terminal facilities following the requisition on December 27, 1941, was to destroy them" (R. 48), it held that their destruction "was a use thereof in the common defense" and a taking for that purpose which entitled the owners to just compensation (R. 54). The Chief Judge and Judge Whitaker dissented on the ground "that property destroyed in actual battle by either side does not call for compensation" (R. 58), "that the destruction was due to battle conditions" and,

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to make war-time requisition of either the use or title of private property had been delegated to anyone by the Commanding General (R. 35).

[4] No claims for compensation are made by the oil companies for the use of this land.

[5] No significance can be attached to the finding that the facilities were "requisitioned" in view of the court's express disclaimer of reliance on the requistioning statute "as it is apparent that no effort was made to comply with that Act" (R. 47).

therefore, was not "taken for public use within the meaning of the Fifth Amendment" (R. 61).

REASONS FOR GRANTING THE WRIT

The instant case presents the question of whether the Fifth Amendment imposes upon the United States an obligation to pay for property of military value which was destroyed by the United States to prevent its imminent capture by an advancing enemy. This question has not been recently considered by this Court, nor has this Court ever squarely passed upon it. Its importance in settling the scope of the war-time liabilities of the United States is readily apparent. It has been estimated that the present cases alone involve claims of more than six million dollars. There are twenty-one other cases now pending in the Court of Claims involving 131 claims of takings based on the loss or destruction of property in the Philippines during 1941 in comparable circumstances. Some twenty additional suits have been filed grounded upon takings in the Philippines during the same period. Although the facts alleged do not make clear the nature of the appropriation charged, it is probable that many, if not all, involve the same theory as the present case. Moreover, no one can foresee the extent to which military necessity in some future conflict may compel similar destruction of property by the United States. Under the decision below, there would be a rigid right to full compensation for such property, regardless of

the Nation's ability to pay. If, as we contend, destruction arising out of military necessity is not compensable as a matter of right, then Congress will remain free to recognize whatever equities are involved to the extent of its judgment as to the Nation's ability to pay.

1. In holding that the destruction of the Pandacan terminal facilities for the purpose of denying their use to the Japanese was a taking within the meaning of the Fifth Amendment, the Court of Claims expressly declined to follow the reasoning of this Court in the leading case of *United States* v. *Pacific Railroad*, 120 U.S. 227.

In that case the Government, to aid prosecution of the Civil War, rebuilt several railroad bridges which had been destroyed by the Federal Army to obstruct the advance of the enemy. Subsequently, the United States, in order to reimburse itself for the reconstructed bridges, withheld payment of an indebtedness to the railroad for which the railroad brought suit. The Court first reasoned that the railroad was not entitled to compensation for the bridges destroyed (p. 234):

> The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy,

> as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.[6]

It then held that, conversely, the Government could not recover for private property values created in military operations (p. 239):

> While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not com-

[6] The Court drew a distinction between property destroyed for military purposes and property taken for use by the Army, pointing out the "where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses and places of deposit of war material, or to house soldiers or take care of the sick * * * it has been the practice of the government to make compensation for the property taken." (p. 239).

> pel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government.

Thus, although not called upon to decide the question, the Court reached the result in the *Pacific Railroad* case on the basis of its view that the Government was not liable for private property destroyed. As the opinion stated, "The court will leave the parties where the war and military operations of the government left them" (p. 240).

The Court of Claims declined to follow the deliberately considered rationale of this Court and reached an opposite result in reliance on its own decisions in *Grant* v. *United States,* 1 C. Cls. 41, and *Wiggins* v. *United States,* 3 C. Cls. 412, and a passing observation in *Mitchell* v. *Harmony,* 13 How. 115, 133, all of which antedated the decision in the *Pacific Railroad* case. In so doing, it disregarded its own later decisions in *Presbyterian Church* v. *United States,* 33 C. Cls. 339, and *Walker* v. *United States,* 34 C. Cls. 345, both of which drew the same distinction, between property taken for beneficial use and property destroyed, which this

Court had drawn earlier in the *Pacific Railroad* case.[7]

The present state of judicial authority on the important question of the Government's liability under the Fifth Amendment in these circumstances warrants review by this Court.

2. Moreover, rulings denying compensation for losses suffered in other circumstances through destruction or seizure as the result of hostilities suggest that the decision below is incorrect. Destruction by the Army in occupied enemy territory of the property of an American corporation in order to preserve the health of the troops does not give rise to a claim for compensation. *Juragua Iron Co.* v. *United States*, 212 U.S. 297. Requiring wagon trains to remain with the armed forces as a matter of military necessity with the result that the animals died from overwork and starvation "cannot be construed as a seizure and impressment of their property into the public service." *United States* v. *Irwin*, 127 U.S. 125, 130. Recovery was limited to the actual use of the animals in hauling government trains. The Court of Claims has itself held that livestock destroyed as a result of an Army order for the evacuation of the Aleutians

[7] The decision in the *Pacific Railroad* case has been referred to by this Court for the view that the Government is not liable for the destruction of private property in necessary military operations in *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 307, and *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155.

were not "taken" under the Fifth Amendment. *Aleutian Livestock Company, Inc.* v. *United States,* 96 F. Supp. 626, certiorari denied, 342 U.S. 875. Cf. *Respublica* v. *Sparhawk,* 1 Dall. 357.

The property of a citizen of the United States domiciled in a foreign country which was shipped before knowledge of war with that country has been held confiscable by the United States upon capture. *The Venus,* 8 Cranch 253. Permission from the owners of a vessel for its use in hostile enterprises against the United States renders the vessel subject to confiscation because of the "necessity for guarding the public safety." *Jecker* v. *Montgomery,* 18 How. 110, 119.

In time of war, as legitimate means of harassing the enemy, the United States can confiscate or destroy all enemy property within its reach without compensation. *Brown* v. *United States,* 8 Cranch 110, 129; *Miller* v. *United States,* 11 Wall. 268, 305; *White* v. *Mechanics Securities Corp.,* 269 U.S. 283; *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1; *Woodson* v. *Deutsche Gold Und Silber Scheideanstalt Vormals Roessler,* 292 U.S. 449. Use of the vessel of an enemy corporation has been held not compensable under the Constitution because it was a seizure "for purposes of war, and not for any purposes of gain," "an act of war occurring within the limits of military operations." *Hijo* v. *United States,* 194 U.S. 315, 322, 323.

Even the majority opinion below recognized "that the distinction between cases where property

Miscellaneous—Continued

	Page
19 Cong. Rec.:	
p. 32	45
p. 241	45
21 Cong. Rec.:	
p. 111	45
p. 3413	45
p. 6326	45
23 Cong. Rec.:	
p. 26	45
p. 234	45
25 Cong. Rec.:	
p. 329	45
p. 2184	45
91 Cong. Rec.:	
p. 10788	51
p. 10828	51
p. 11036	51
p. 11463	51
p. 11470	51
92 Cong. Rec.:	
p. 3392	51
pp. 3435–3450	51
p. 3676	51
p. 3773	51
p. 3987	51
p. 4038	51
Cong. Rec., July 5, 1952, pp. 9588–9591	54
Davis, *Elements of International Law* (1903), p. 352, note 2	57
Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 Am. J. Intl Law 748	53
Grotius, *De Jure Belli Ac Pacis Libri Tres, The Classics of International Law No. 3*, Vol. II, (1925 ed.):	
Bk. II, ch. XIV, Sec. VII	55
Bk. III, ch. XX, Sec. VIII	55
V Hackworth, *Digest of International Law* (1943), pp. 701–702	60
VI Hackworth, *Digest of International Law* (1943), Sec. 609	55
Halleck, *International Law* (4th Ed. 1908):	
Vol. I, p. 520, Note 1	55
Vol. II, p. 56	55–56
Vol. II, pp. 70–71	55
H. Rep. No. 1921, 79th Cong., 2d Sess	51, 52
H. Rep. No. 1957, 79th Cong., 2d Sess	51
H. Rep. No. 2500, 51st Cong., 1st Sess	45
H. Rep. No. 134, 43d Cong., 2d Sess., p. 296	44
Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, April 24, 1863, par. 15	55

Miscellaneous—Continued

	Page
Lawrence Report, H. Rep. No. 362, 43rd Cong., 1st Sess., as revised and enlarged, H. Rep. No. 134, 43rd Cong., 2d Sess.:	
pp. 205–297	39
pp. 281–297	16, 40
p. 294	40
p. 296, note 175	44
IV Moore, *International Arbitrations* (1898):	
p. 3674	58
p. 3683	58
p. 3684	58
pp. 3703–3704	59
pp. 3705–3706	58
pp. 3718–3720	58
pp. 3734–3735	58
VI Moore, *International Law Digest* (1906), p. 883	62
I Nichols, *Law of Eminent Domain* (3d Ed.):	
Sec. 1.43	25
Sec. 1.44	25
Sec. 1.44 [7]	25, 56, 57
II Oppenheim, *International Law* (2d Ed. 1912) Sec. 102, pp. 446–449	55
Report of War Claims Comm., H. Doc. No. 580, 81st Cong., 2d Sess	54
Robinson, *War Damage Compensation and Restitution in Foreign Countries*, 16 Law & Contemp. Prob. 347	53
Rules of the U. S. Court of Claims, Rule 38 (c)	2
Schein, *War Damage Compensation Through Rehabilitation: The Philippine War Damage Commission*, 16 Law. & Contemp. Prob. 549	52
S. 161, 42d Cong	45
S. 490, 42d Cong	47
Sen. Doc. No. 25, 58th Cong., 2d Sess., pp. 6–7	59
Sen. Ex. Doc. No. 85, 42nd Cong., 2d Sess	43
Sen. Ex. Doc. No. 86, 42nd Cong., 2d Sess	43
Sen. Ex. Doc. No. 33, 42nd Cong., 3rd Sess	43, 47
Sen. Ex. Doc. No. 42, 42nd Cong., 3rd Sess	15, 43, 45
S. J. Res. 171, 82d Cong., 2d Sess	54
S. Rep. No. 112, 39th Cong., 2d Sess	44
S. Rep. No. 69, 41st Cong., 2d Sess	44
S. Rep. No. 9, 42nd Cong., 2d Sess	44
S. Rep. No. 50, 42nd Cong., 2d Sess	45
S. Rep. No. 412, 42nd Cong., 3rd Sess	44
S. Rep. No. 144, 44th Cong., 1st Sess., Parts 1 and 2	45
S. Rep. No. 710, 47th Cong., 1st Sess	45
S. Rep. No. 22, 48th Cong., 1st Sess	49
S. Rep. No. 40, 48th Cong., 1st Sess	49
S. Rep. No. 99, 48th Cong., 1st Sess	45

the cost of acquisition" (R. 53-54), is not a constitutional principle and does not meet the practical exigencies of conducting war. The cases are legion in which war regulations deemed necessary by Congress have had an uneven impact upon the people.

Non-compensable losses are endured by many segments of the nation as a result of the total mobilization of effort, manpower and of property required to win the war. Cf. *Lichter* v. *United States*, 334 U.S. 742, 755-765, 767. Many business enterprises have had to curtail and even cease operations because deprived of needed materials by priority and allocation orders. See *Steuart & Bro.* v. *Bowles*, 322 U.S. 398; *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C.A. 2), certiorari denied, 322 U.S. 764; *Shreveport Engraving Co.* v. *United States*, 143 F. 2d 222 (C.A. 5), certiorari denied, 323 U.S. 749; *St. Regis Paper Company* v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U.S. 815; *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U.S. 948. Price ceilings have been imposed on every commodity bought and sold. *Yakus* v. *United States*, 321 U.S. 414; *Bowles* v. *Willingham*, 321 U.S. 503. Restrictions have been placed on wages, the right to strike, and collective bargaining. See *A Symposium on Labor Law in War Time* (1944) 29 Ia. Law Rev. 145, *et seq.* Excessive profits have been recaptured. *Lichter* v. *United States*, 334 U.S. 742.

The Government conscripted millions of citizens into the armed services, divorcing them from their normal pursuits, separating them from their families, and exposing them to the hardship and hazards of combat, including possible injury and loss of life. *Falbo* v. *United States*, 320 U.S. 549; *Selective Draft Law Cases*, 245 U.S. 366; *cf. Commers* v. *United States*, 159 F. 2d 248 (C.A. 9), certiorari denied, 331 U.S. 807.[10]

Each of these systems of regulation or control frequently imposed serious deprivations, hardship, or reduction in property values on those subject to its reach, but these losses had to be borne without compensation, as part of the national war effort. It is in nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States*, 334 U.S. at 754. See also *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 305.

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[10] To further prosecution of the war, this Court has also sanctioned the restriction of the personal freedom of American citizens by curfew orders and the designation of areas of exclusion (*Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214), the restriction of freedom of speech in a manner that would be unwarranted in time of peace (*Schenck* v. *United States*, 249 U. S. 47), the prohibition of the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146), and Government operation of the railroads (*Northern Pacific Railway Co.* v. *North Dakota*, 250 U. S. 135).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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